# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1956

**No. 893**

**(formerly No. 568 Misc.)**

CARYL CHESSMAN,

*Petitioner,*

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin, California,

*Respondent.*

## PETITIONER'S BRIEF.

GEORGE T. DAVIS,
98 Post Street, San Francisco 4, California,
*Attorney for Petitioner.*

CARYL CHESSMAN,
Box 66565, San Quentin, California,
*Petitioner pro se.*

ROSALIE S. ASHER,
County Court House, Sacramento 14, California,
*Of Counsel.*

## Subject Index

## Table of Authorities Cited

## Constitutions



## Codes

## Rules



## Texts

## NOTE.

The Transcript of Record from the District Court will be referred to as R. ....., Vol. I.

The Reporter's Transcript of the pre-trial proceedings in the District Court (pre-trial record) will be referred to as PTR ....., Vols. II or III.

The Reporter's Transcript of the hearings in the District Court will be referred to as HR ....., Vols. IV, V, VI, VII, VIII, IX, X, or XI.

The Reporter's and Clerk's Transcripts on Appeal to the California Supreme Court will be referred to as Rep. Tr. ..... and Cl. Tr. .....

The original exhibits before the District Court will be referred to as Pet. Ex. ..... and Resp. Ex. .....

Unless otherwise indicated, emphasis has been added by petitioner.

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1956

No. 893
(formerly No. 566 Misc.)

CARYL CHESSMAN,
*Petitioner,*

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin, California,
*Respondent.*

## PETITIONER'S BRIEF.

The United States District Court for the Northern District of California, Southern Division, discharged a writ of habeas corpus previously granted and remanded Petitioner to the custody of Respondent for execution. (R. 204-215, Vol. I.) Brought here for review was the bare two-to-one judgment, decision and opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court's action.

(R. 264-281, 286, Vol. I.) On April 8, 1957, this Court granted certiorari and gave petitioner until April 24, 1957, to file this brief.

---

**REFERENCE TO REPORTED OPINIONS.**
**[Rule 40-1(a).]**

*Chessman v. Teets* (1956), 239 Fed. 2d 205. This is the opinion of the United States Court of Appeals, written by Judge Frederick G. Hamley and concurred in by Judge Dal M. Lemmon, here questioned. A copy of this opinion, the dissenting opinion of Chief Judge William Denman, as well as Judge Denman's dissenting opinion from the denial of rehearing, Judge Lemmon's memorandum opinion and the answering memorandum of Judge Denman are set out in the appendix to the Petition for Writ of Certiorari.

Earlier reported opinions, dealing with various aspects of the litigation are:

*People v. Chessman* (1950), 35 Cal. 2d 455, 218 P. 2d 769, 19 A.L.R. 2d 1084;

*People v. Chessman* (1951), 38 Cal. 2d 166, 238 P. 2d 1001;

*Chessman v. California* (1953), 205 F. 2d 128;

*In re Chessman* (1954), 43 Cal. 2d 296, 273 P. 2d 263;

*People v. Superior Court & In re Chessman* (1954), 273 P. 2d 936;

*In re Chessman* (1954), 43 Cal. 2d 408, 274 P. 2d 655;

*In re Chessman* (1955), 128 F. Supp. 600;
*In re Chessman & People v. Superior Court* (1955) 44 Cal. 2d 1, 279 P. 2d 24.
*Application of Chessman* (1955), 219 F. 2d 162;
*Chessman v. Teets* (1955), 221 F. 2d 276.

See also the companion case of an alleged and convicted confederate:

*People v. Knowles* (1950), 25 Cal. 2d 175 *(sub nomine) People v. Chessman,* 217 P. 2d 1.) This is the opinion and decision of the California Supreme Court construing sec. 209 of the California Penal Code under which Petitioner is sentenced twice to death and twice to life imprisonment. Here the state Supreme Court divided four to three, the bare majority holding that robbery *was* kidnapping and punishable as such. The 1951 Regular Session of the California Legislature repudiated this construction by amending the section and granting relief to everyone convicted who had been sentenced to life imprisonment without possibility of parole. (Stats. 1951, ch. 1749, p. 4167.) Yet Petitioner's conviction was allowed to stand (*People v. Chessman, supra,* 38 Cal. 2d 166), although he then apparently was placed in the unique position of being twice sentenced to death for acts (regardless of by whom committed) no longer triable and punishable at all under the kidnapping statute.

The case has been before this Court on six previous occasions on certiorari:

1. *Chessman v. California et al.* (1950), No. 98 Misc., Oct. Term, 1950, certiorari denied October 9, 1950, 340 U.S. 840.

2. *Chessman v. California* (1951), No. 442 Misc. Oct. Term, 1950, certiorari denied May 14, 1951, 341 U.S. 929.

A motion for leave to file an original petition for writ of habeas corpus was also denied.

3. *Chessman v. California* (1952), No. 371 Misc., Oct. Term, 1951, certiorari denied March 31, 1952, 343 U.S. 915; rehearing denied April 28, 1952, 343 U.S. 937.

4. *Chessman v. California* (1953), No. 239 Misc., Oct. Term, 1953, certiorari denied December 14, 1953, 346 U.S. 916; rehearing denied February 1, 1954, 347 U.S. 908.

5. *Chessman v. Teets* (1954), No. 285, Oct. Term, 1954, certiorari denied October 25, 1954, without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court, 348 U.S. 864.

6. *Chessman v. Teets* (1955), No. 196, Oct. Term, 1955, certiorari granted, Court of Appeals for Ninth Circuit reversed, and cause remanded to the District Court for a hearing, 350 U.S. 3.

## JURISDICTIONAL STATEMENT.

[Rule 40-1(b).]

Petitioner sought and asked this Court to grant a writ of certiorari under 28 U.S.C. 1254(1).

The petition for the writ was timely. It was filed February 1, 1957, well within the ninety-day jurisdictional period required by 28 U.S.C. 2101(c), which would have expired February 18, 1957. This Court granted the petition April 8, 1957. (*Chessman v. Teets,* 1 L. Ed. 2d ....., 25 Law Week 3293.)

The Court of Appeals decided the case October 18, 1956 (R. 286, Vol. I), and denied a timely filed petition for rehearing November 20, 1956 (R. 287, Vol. I).

Precedent jurisdiction was established as follows:

Jurisdiction of the District Court to entertain the petition was based upon the allegations of deprivation of constitutional rights under the Fourteenth Amendment by the Courts, agencies and agents of the State of California (28 U.S.C. 2241, 2242, 2243), the exhaustion of Petitioner's remedies in the State Courts (28 U.S.C. 2254), including application for and denial by this Court of a petition for writ of certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court" (*Chessman v. Teets,* 348 U.S. 864), and this Court's subsequent holding, in granting certiorari, reversing the Court of Appeals, and remanding the case to the District Court for a hearing, that Petitioner's charges, if sustained, set forth a denial of Due Process. (*Chessman v. Teets,* 350 U.S. 1.)

Jurisdiction was conferred on the Court of Appeals to review the order and judgment of the District Court (discharging the writ of habeas corpus previously granted and remanding the petitioner to custody, *Chessman v. Teets*, 138 F. Supp. 761) when that Court's Chief Judge granted a certificate of probable cause to appeal (28 U.S.C. 2253; R. 252-254, Vol. I) and on the same date when Petitioner filed his notice of appeal. (R. 255, Vol. I.) The appeal was prosecuted under the provisions of 28 U.S.C. 1291, 1294(1), 2253, and Rule 73, Fed. Rules Civ. Proc.

---

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

**[Rule 40-1(c).]**

Constitution of the United States, XIV Amendment, sections 1 and 5:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"
>
> "The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Constitution of California, Article VI, section 4½:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after *an examination of the entire cause, including the evidence,* the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California Penal Code, sec. 209, as in effect during Petitioner's trial:

> "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnapping suffers or suffer bodily harm, or shall be punished by imprisonment in the State prison for life without possibility of parole in cases where such person or persons do not suffer bodily harm."

California Penal Code, sec. 209, now in effect as result of 1951 amendment (Stats. 1951, ch. 1749, p. 4167):

"Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward, or to commit extortion or to extract from relatives or friends of such person any money or valuable thing; or *any person who kidnaps or carries away any individual to commit robbery*, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnapping suffers or suffer bodily harm shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

*"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole."*

California Penal Code, sec. 1239 (b):

"When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

California Code of Civil Procedure, sec. 953 (c):

"When it shall be impossible to have a phonographic report of the trial transcribed by a sten-

ographic reporter as provided by law or by rule, because of the death or disability of a reporter who participated as a stenographic reporter at the trial, or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the Court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding."

California Rules on Appeal, Rule 33 (c):

"Where a judgment of death has been rendered and an appeal is taken automatically as provided by law, *the entire record of the action shall* be *prepared.* For the purpose of computing time for preparation of the record, the notice of appeal shall be deemed to have been filed at the time of rendition of the judgment."

California Rules on Appeal, Rule 35 (b):

"Where a reporter's transcript is required, the clerk, immediately on the filing of the notice of appeal, shall notify the reporter. The reporter shall prepare an original and 3 clearly legible typewritten copies of the reporter's transcript in the manner and form required by Rule 9, and *shall append to the original and each copy a certificate that it is correct.* He shall deliver the original and all the copies to the clerk immediately on their completion, and in no case more than 20 days after the filing of the notice of appeal, unless such time is extended as provided in subdivision (d) of this rule."

## THE QUESTION PRESENTED FOR REVIEW.
[Rule 40-1(d)(10).]

As framed by the Court in its order granting certiorari, the question to be decided is:

Whether in the circumstances of this case, the State Court proceedings to settle the trial transcript, upon which petitioner's automatic appeal from his conviction was necessarily heard by the Supreme Court of the State of California, in which the trial Court proceedings petitioner allegedly was not represented in person or by counsel designated by the State Court in his behalf, resulted in denying petitioner due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

---

## STATEMENT OF THE CASE.
[Rule 40-1(e).]

### A. History of the Present Litigation.

The petition for the writ was originally filed in the District Court as No. 34,375-Civil on December 30, 1954, after this Court had denied certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." (*Chessman v. Teets,* No. 285, Oct. Term, 1954, 348 U.S. 864.)

On January 4, 1955, Judge Louis E. Goodman summarily denied the petition without hearing or requiring Respondent to answer. (R. 24, Vol. I; *In re Chessman,* 128 F. Supp. 600.)

Two days later Judge Goodman refused to issue a certificate of probable cause. (R. 36, Vol. I.) Petitioner then applied to Chief Judge William Denman of the Court of Appeals for the Ninth Circuit for the certificate, and on January 11, 1955, Judge Denman certified there was probable cause to appeal and ordered that Petitioner's execution, then scheduled for January 14, 1955, be stayed. (R. 39-43, Vol. I; *Application of Chessman*, 219 F. 2d 162.) The notice of appeal (R. 37, Vol. I) dated January 5, 1955, was filed, and the appeal docketed as No. 14,621 in the Court of Appeals.

After the cause was briefed and argued on a shortened time, on April 7, 1955, the order denying the petition for habeas corpus was affirmed by the Court of Appeals sitting en banc. (R. 47-48, Vol. I; *Chessman v. Teets*, 221 F. 2d 276.) Rehearing was denied on May 6, 1955, and on May 12 an order amending the order denying rehearing was filed, with Petitioner's stay of execution being thereby terminated.

On May 13, 1955, Petitioner was resentenced to death, with the date of execution in the warrant fixed for July 15, 1955.

On June 30, 1955, the case was docketed in this Court and a petition for a writ of certiorari was filed, No. 196, October Term, 1955. Justice Tom Clark granted Petitioner's application for a stay of execution pending a decision on the petition for a writ of certiorari, the stay order being filed by this Court's clerk on July 6, 1955.

On October 17, 1955, this Court granted certiorari, reversed the Court of Appeals, and remanded the case to the District Court for a hearing. (*Chessman v. Teets*, 350 U.S. 3.) In its Per Curiam opinion, this Court discussed Petitioner's claims and held as follows:

> "Petitioner applied to the United States District Court of California, Southern Division, for a writ of haveas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been heard upon a fraudulently prepared transcript of the trial proceedings. The official court reporter had died before completing the transcript of his stenographic notes of the trial, and petitioner alleges that the prosecuting attorney and the substitute reporter selected by him had, by corrupt arrangement, prepared the fraudulent transcript. On the record before us there is no denial of the petitioner's allegations. The District Court, without issuing the writ or an order to show cause, dismissed the application as not stating a cause of action. 128 F. Supp. 600. The Court of Appeals affirmed the order of the District Court. 221 F. 2d 276. The charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment. See Mooney v. Holohan, 294 U.S. 103. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for a hearing."

And in earlier certifying probable cause (*Application of Chessman*, 219 F. 2d 162), Chief Judge Denman observed (R. 41, Vol. I):

> "How important the California law regards the transcription (of the trial proceedings) and certification (as to its correctness) by the reporter is apparent from the fact that in *civil* cases the death of the reporter before his transcription and certification, gives the trial court the discretionary power to set aside the judgment and order a new trial. California Code of Civil Procedure, sec. 953(e). By some quirk in California legislation this does not apply to criminal cases. However, it is obvious that if the reporter's transcript is so important as to give the court such power in a civil case, *a fortiori* it must have such importance in a criminal case, in which, on the evidence to be transcribed, the accused is sentenced to death. Likewise its importance is emphasized by the California law making the appeal automatic from death sentences. California Penal Code sec. 1239(b)."[1]

This Court's mandate came down and was filed in the District Court on November 28, 1955. (R. 53, Vol.

[1]Directly as a result of Petitioner's case, the present session of the California Legislature has taken cognizance of, and is taking steps to correct, this "quirk" in California legislation, as recognized by Chief Judge Denman. State Senate Bill 688, which contains provisions virtually the same as sec. 953(e) of the California Code of Civil Procedure and which would give the trial court discretionary power to grant a new trial in a criminal case in the event the court reporter died, became disabled or his notes were lost, received a "do pass" recommendation from the Senate Judiciary Committee on April 7, 1957. The Senate voted approval of the measure on April 11, 1957, but subsequently voted to reconsider. The bill is backed by the State Bar of California and members of the judiciary.

I.) The matter was assigned back to Judge Goodman on November 30, 1955 (PRT 2-6, Vol. H). Judge Goodman ordered Petitioner's execution stayed (R. 54, Vol. I), and issued a writ of habeas corpus, returnable December 8, 1955 (R. 55, Vol. I.)

Petitioner was produced in Court on December 8, 1955, a return to the writ was filed, it was stipulated that the petitioner was to be treated as a traverse to the return, and hearing of the matter was set for January 9, 1956, then put over one day to January 10, 1956, and later re-set for January 16, 1956.

Having exhausted his funds and credit, Petitioner was obliged to file an affidavit seeking to proceed *in forma pauperis* on January 7, 1956. (R. 139, Vol. I.) On January 10, 1956, Judge Goodman, while expressing doubt it would mean anything, granted Petitioner leave to proceed *in forma pauperis*. (R. 157, Vol. I.)

The ordered hearings were held, with Petitioner present, on January 16, 17, 18, 19, 20, 23 and 24, 1956. (H.R. 1-919, Vols. IV-X.)

On January 25, 1956, Judge Goodman ordered the matter submitted (H.R. 920-923, Vol. XI), and on January 31, 1956, Judge Goodman vacated the stay of execution, discharged the writ, and remanded Petitioner to custody of the Respondent for execution. (R. 204-215, Vol. I; *Chessman v. Teets,* 138 F. Supp. 761.)

Petitioner applied to the District Court for a certificate of probable cause to appeal on February 10, 1956. (R. 218, Vol. I.) On February 15, 1956, Judge Goodman refused to issue the certificate. (R. 251, Vol. I.)

Thereafter, on February 29, 1956, Chief Judge William Denman of the Court of Appeals certified probable cause (R. 252-254, Vol. I) and on that same date Petitioner filed his second notice of appeal. (R. 255, Vol. I.)

Pursuant to the provisions of 28 U.S.C. 1915, on his application, Petitioner was granted leave to prosecute the appeal *in forma pauperis* and on a typewritten record. (R. 261, Vol. I.)

On October 18, 1956, the Court of Appeals affirmed the order of the District Court (R. 287, Vol. I). The majority opinion (R. 264-281, Vol. I); *Chessman v. Teets,* 239 F. 2d 205, was written by Judge Frederick G. Hamley and concurred in by Judge Dal M. Lemmon.

In that opinion the Court of Appeals expressly recognized that Petitioner alleged in the petition that "he had not been afforded effective representation of counsel in the matter of settling the transcript and had been deprived of the right to be present at the hearing on the settlement of the transcript." (R. 266, Vol. I; 239 F.2d at 210.)

Further along the opinion notes that "the (District Court), on remand, limited the consideration of the case to the question of fraud. The extensive opinion of (the District Court) contains no discussion of the issue which appellant presents under this specification of error. Nor are there any findings of fact of conclusions of law which deal with that issue. We assume, without deciding that, despite the circumstances just

indicated, appellant may here present the question now under discussion." (R. 278, Vol. I; 239 F. 2d at 217.)

The question was then considered and decided against Petitioner solely on the basis of the District Court's challenged findings, and earlier decisions of the Court of Appeals and the California Supreme Court. The opinion concluded that Petitioner "was not constitutionally entitled to appear in person and to participate in the settlement of the transcript." (R. 281, Vol. I; 293 F. 2d at 219.)

Chief Judge William Denham dissented. In his dissenting opinion (R. 18-22, Vol. I; 239 F. 2d 205 at 219) Judge Denman maintained that the majority opinion "proceed(ed) on a piecemeal application of the Fourteenth Amendment," and that, under the fact situation disclosed by the record, the state trial Court's order "creating the record must be set aside and the California Supreme Court's affirmation based on that record also must be set aside and the trial for the determination of the record proceed anew in the Los Angeles Superior Court with Chessman participating therein."

A timely filed petition for rehearing was denied November 20, 1956 (R. 287, Vol. I). Again Chief Judge Denman dissented. He stated: (R. 289, Vol. I):

> "This is clearly a case where the Court first finds that the due process clause of the Fourteenth Amendment applies for all appeals created by state law and then in this appeal, a matter of life or death to the appellant, says that it is inapplic-

able to a trial to determine the text of the record upon which the death sentence is to be determined as valid or invalid."

One week following the denial of the rehearing, Judge Lemmon, speaking for himself, filed an extraordinary memorandum opinion (R. 292-295, Vol. I), in which, *inter alia*, he argued that his Court was jurisdictionally barred from considering the question whether Petitioner had a constitutional right to be present at the settlement proceedings, but had considered the question, nevertheless, and that "The matter should end there."

The following day, November 28, 1956, Chief Judge Denman filed his own memorandum opinion, amended by order of December 13, 1956, answering Judge Lemmon and reaffirming his own position. (R. 295-297; 239 F. 2d at 223.)

Thereafter Petitioner filed with this Court his motion and supporting affidavit for leave to proceed *in forma pauperis* under the provisions of 28 U.S.C. sec. 1915 and on February 1, 1957, Petitioner filed his Petition for Writ of Certiorari. Subsequently Respondent filed a brief in opposition and Petitioner filed a brief in reply to that opposition.

A detailed statement of both the pre-trial proceedings and the hearings in the District Court, showing what was proved and what was not permitted to be proved, as well as the manner in which the hearings were conducted, is set out in the petition for certiorari at pages 17-24 and 36-46 respectively. Except to the

extent that these facts have a direct bearing on the single question to be decided, they will not be repeated here.

**B. The Court's Order Granting Certiorari.**

The Court's order of April 8, 1957 reads in its entirety:

> "The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The case is transferred to the appellate docket and set for oral argument on May 13, 1957, upon the following terms:
>
> "1. The writ of certiorari is limited to the question whether, in the circumstances of this case, the state court proceedings to settle the trial transcript, upon which Petitioner's automatic appeal from his conviction was necessarily heard by the Supreme Court of the State of California, in which trial court proceedings Petitioner allegedly was not represented in person or by counsel designated by the state court in his behalf, resulted in denying Petitioner due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.
>
> "2. Appearances upon the writ of certiorari will be confined to counsel for the respective parties, and their argument will be limited to the single question indicated above.
>
> "3. The brief for the Petitioner will be served and filed on or before April 24, 1957. The brief for the Respondent will be served and filed on or before May 10, 1957. The Petitioner may file a reply brief within one week after the oral argument.

"The Chief Justice took no part in the consideration or decision of this application."

**C. Proceedings in the State Courts Relative to, and Facts Adduced in the District Court Dealing With, the Preparation, Settlement, Approval and Acceptance of the Disputed Trial Transcript.**

Petitioner was tried in the Los Angeles County Superior Court before a jury for the alleged commission of 18 felony charges. (The original trial record is before this Court as a part of Petitioner's Exhibit 1, records of the California Supreme Court in Crim. 5006, *People v. Chessman.*

The trial was a lengthy one, beginning April 29 and ending May 21, 1948. Petitioner defended himself. (A deputy public defender, Al Matthews, sat with Petitioner during the trial as a "legal advisor", not as counsel. His services in that capacity terminated at the conclusion of the trial.) Eighty-one witnesses for the prosecution and defense testified and were called or recalled a total of more than 120 times. (See Rep. Tr, Vol. I, General Index to Witnesses, pp. i-v.). It will be noted that the testimonial evidence alone comprises 1500 pages of the disputed Reporter's Transcript. (Rep. Tr., pp. 55-1558.) Eighty-four exhibits were offered (See Rep. Tr. Vol. I, Index to Exhibits, pp. vi-x). There were two full days of argument to the jury. (Rep. Tr. pp. 1559-1786.) More than 50 different complex instructions were given. (Cl. Tr. pp. 83-134.)

On May 21, 1948, Petitioner was found guilty of 17 of the charged felonies, acquitted on one. (Cl. Tr. pp.

172-222.) Motion for new trial was denied and judgment rendered on June 25, 1948, and Petitioner was then sentenced twice to death[2] and to 15 terms of imprisonment.[3]

With respect to the two death sentence convictions, an appeal was automatically taken (California Penal Code sec. 1239 (b). As well, out of an abundance of caution, Petitioner noticed an appeal as to all judgments of conviction and from denial of his motion for a new trial on June 30, 1948. (Petitioner's Exhibit 1, Cl. Tr. p. 266.)

The official Court reporter died of heart disease on June 23, 1948 (Pet. Exhibit 18, Death Certificate of Ernest R. Perry),[4] which was after the trial and be-

---

[2]For two violations of section 209 of the California Penal Code charging Kidnapping for the Purpose of Robbery, with a finding of bodily harm by the jury and a fixing of the punishment at death.

[3]For two violations of section 209 of the California Penal Code, charging Kidnapping for the Purpose of Robbery, with a finding by the jury of bodily harm and a fixing by the jury of the punishment at life imprisonment without possibility of parole as to one count, and no finding as to bodily harm on the other count; for two violations of section 288a of the California Penal Code; for one count of Attempted Rape; for one count of Grand Theft of an automobile; for eight counts of First Degree Robbery; and for one count of Attempted Robbery.

[4]Before this Court, as a part of the certiorari record, are the original exhibits of both Petitioner and Respondent which were either received in evidence or marked for identification in the District Court. Petitioner's Exhibits 1 to 18, 20 and 21 were received in evidence. (H.R. 152-157, 181, Vol. V; 296, 317, 348, Vol. VI; and 570, Vol. VII.) Petitioner's Exhibits 19 and 22 were marked for identification only. (H.R. 330, Vol. VI and 582, Vol. VII.) Respondent's Exhibits A, B, D, E, F, G-1 through G-6 and H were received in evidence. (H.R. 109, Vol. IV; 277, Vol. V; 387, 396, Vol. VI; 497, Vol. VII, and 905-906, Vol. X.) Respondent's Exhibits C and I were marked for identification only. (H.R. 298, Vol. VI; 831, Vol. X.)

fore he had completed some 1200 pages of testimony, plus another 300 pages of voir dire examination of prospective jurors and the prosecutor's opening address.

Immediately following the pronouncement of judgment, Petitioner moved the trial Court, the Honorable Charles W. Fricke, to set aside and vacate the judgment on the ground it was impossible to prepare a record for use on the automatic appeal. The motion was denied. Judge Fricke stated: "The Court will take judicial notice that Ernest R. Perry, who reported the trial, is dead." He then directed the preparation of the record "to the limit of human beings in their use of human ingenuity." (Pet. Ex. 1, jacket 3; Rep. Supp. Tr. on appeal, proceedings of June 25, 1948, pp. 14-16.)

Preparation of the record by this unique means, under the direction of J. Miller Leavy, Petitioner's prosecutor, was undertaken and Leavy finally selected his uncle-in-law, Stanley Fraser, to attempt a transcription of the dead reporter's shorthand notes. (The alleged relationship between Leavy and Fraser did and does exist. Fraser was and is the uncle-in-law of Leavy.) (H. R. 170, Vol. V; 452 Vol. VII), a fact kept concealed from Judge Fricke until after the transcript was settled. (H.R. 860-861, Vol. X).

A contract between Fraser and the Los Angeles County Board of Supervisors was entered into, cancelled, and then renegotiated, on the positive but unverified representations of Leavy that not only Fraser but other reporters as well could read the notes. (Pet.

Exs. 2, 3, and 4, Secretary of Superior Court file, Board of Supervisors file, and copies of minutes of Board of Supervisors authorizing two Fraser contracts, respectively.) Fraser *was,* as alleged in the petition for habeas corpus, paid over three times the statutory fee for his preparation of the transcript. (H.R. 208-209, Vol. V.)

On September 16, 1948, Harry R. Person, as Chairman of the Executive Committee of the Los Angeles Superior Court Reporter's association, wrote the Board of Supervisors of Los Angeles strongly protesting the letting of a contract for preparation of a contract from Mr. Perry's shorthand notes. (Pet. Ex. 3, true copy in this file; H.R. 69, Vol. IV.) The concluding paragraph of this letter stated:

> "We believe the purported charge against the county is not only an exorbitant one per se, but will reflect further adverse publicity upon our group because we have serious doubts that any reporter will be able to furnish a usable transcript of said shorthand notes. Other reporters of our number have examined and studied Mr. Perry's notes and have reached the conclusion that many portions of the same will be found completely indecipherable because, toward the latter part of each court session, Mr. Perry's notes show his illness. We feel that this should be brought to your attention."

and Judge Fricke *had* heard (he testified in the District Court) that the notes could not be transcribed with sufficient accuracy and that other reporters had examined the notes and could not read them, but

Leavy had represented to him that Fraser could. (H.R. 860, 862-863, 875.)

Petitioner sought a writ of prohibition against preparation of this transcript on the ground the notes could not be transcribed with any reasonable degree of accuracy and, in opposition, both Leavy and Fraser swore Petitioner was wrong and that what amount to a "verbatim" transcript of the trial proceedings was being prepared by Fraser. Leavy further swore that petitioner would have the transcript delivered to him "in court" and would be allowed to make any objections he might have to it at that time. On the basis of these sworn statements, the California Supreme Court summarily denied the writ. (Pet. Ex. 1: *Chessman v. Superior Court,* Crim. 4950: petition, opposing memorandum, and Leavy and Fraser affidavits in support of opposition.) (Judge Fricke testified in the District Court that he had *not* told Leavy he was going to produce Petitioner at the settlement and *never* had given Leavy authority to file the affidavit with the California Supreme Court in which Leavy had sworn Petitioner would be produced in Court at the time of the settlement proceedings. (H.R. 883, 887, Vol. X.)

Preparation of the record thus was permitted to continue, over Petitioner's protests. (Not only did Petitioner futilely seek to halt preparation of the transcript, but he had earlier filed with the Clerk of the Los Angeles County Superior Court an affidavit in which he asked that he be furnished the "raw" transcript—that is, the rough draft of the transcript before it was edited or otherwise changed and copied in

final form: Pet. Ex. 12, handwritten affidavit on file herein. The request was ignored.)

After many months and extensions of time (See Pet. Ex. 1: file of extensions Nos. 2692, etc.), on February 24, 1949, Leavy offered the partial Fraser Reporter's transcript for filing in the trial court. He then said: "In order for Mr. Fraser to complete this record, *it has been necessary to submit to me the rough draft form in order that I may read it before he has copied it into final form.*" (Pet. Ex. 1, jacket 3; Rep. Tr. of Proceedings Refiling of Rep. Tr. on Appeal, p. 3.)

Fraser admitted that he *did* let Leavy check the "rough draft" and *did* "get his (Leavy's) corroboration, his ideas, his recollection in places where I had difficulty. . . ." (H.R. 399, Vol. VI.) Leavy admitted he *did* check the rough draft at both his home and office from time to time—on perhaps more than 25 separate occasions — and satisfy his mind that Fraser "had it." (H.R. 531-532, 536, Vol. VII.) Fraser also used the trial judge's long hand notes as an aid in preparing the transcript. (Resp. Ex. B.)

Without the knowledge of Judge Fricke (H.R. 870-871, Vol. X) or Petitioner (H.R. 592, Vol. VIII), but *with* the knowledge and at the suggestion of Leavy (H.R. 504, 533, Vol. VII), Fraser had conferred with two key prosecution witnesses, Los Angeles detectives Lee Jones and Colin Forbes, about Fraser's rough draft transcription of their trial testimony (H.R. 396-397, 417-420, Vol. VI), thus permitting their testimony to be reconstructed not only in the absence of Peti-

tioner, but out of court and secretly. This fact was not known to the state Supreme Court in any of the proceedings before it, and never disclosed by Leavy or Fraser until the hearing in the District Court. Judge Fricke testified that if he had known Fraser had seen Jones and Forbes, the matter *would* have been raised at the time of the settlement. (H.R. 833, 887, Vol. X.)

On April 11, 1949, on filing the remainder of the transcript, Leavy represented to Judge Fricke: "I have read this entire record, not only every page, but *I feel I have read every word and the only correction I find is the one I am offering at this time . . . I feel this record. . . . what Mr. Fraser prepared from Mr. Perry's notes is as accurate a record as Mr. Perry could have prepared. . . .*" (Pet. Ex. 1, jacket 3: Rep. Tr. of Proceedings re Filing of Rep. Tr. on Appeal, pp. 10-11.) At this same time Leavy represented further: "*. . . he (Fraser) got so he could read Mr. Perry's notes better than his own.*" (Ibid. p. 11.)

Judge Fricke then directed, as appears at the end of the Reporter's Transcript of April 11, 1949, "that defendant appellant be further informed that *there can and will be a hearing for the settlement of this transcript.*" Appellant's copy of the Fraser transcript, as well as a copy of the transcript of these proceedings of February 24, and April 11, 1949, was then mailed to Petitioner and was delivered to him in his death cell. Petitioner[5] then prepared and mailed to

[5]Petitioner, at the time of the settlement of the disputed transcript was appearing in *propria persona*, without representation by counsel. He had been held in San Quentin Prison's death row, awaiting execution since July 3, 1948. For five years and ten

the trial court in Los Angeles his "Motion to Augment and Correct Record," with a long list of noted omissions, and requested corrections with a supporting affidavit. (Pet. Ex. 11.)

In the motion petitioner explicitly stated: "That, as provided by Rule 35 (c), Rules on Appeal, Defendant-Appellant moves a hearing be ordered to determine the jurisdictional question hereinabove raised, to enable the Defendant-Appellant to determine actually the ability of Mr. Fraser to read Mr. Perry's notes, and to enable the Defendant-Appellant to offer a showing this is not, and challenge it as, a usable transcript, and to enable the Defendant-Appellant to point out to the Court the many inaccuracies and omissions in this transcript, to prove these inaccuracies and omissions and for this Court to determine these matters and then if this reporter's transcript can be, in a manner satisfactory and legal, corrected and completed, promptly to do so that the Defendant-Appellant may take his automatic appeal forthwith to the Supreme Court of this State." (Pet. Ex. 11; motion, pp. 2, 3.)

Petitioner further stated: "That affiant has not yet had the opportunity to confer with his legal advisor during the trial and consequently has been hesitant to offer error in certain instances until he has verified this error with his legal advisor." (Pet. Ex. 11, affidavit in support of motion, p. 1.)

Petitioner's express application to be produced in the trial court in Los Angeles when the Fraser tran-

---

months from that date he continued to represent himself. (H.R. 564-565, Vol. VII.) Then he finally was able to secure funds to hire counsel. (Ibid.)

script was settled was first denied *without prejudice* by the California Supreme Court (Pet. Ex. 1: application and order of denial in file of Crim. 5006) and simply ignored by the trial Court, Judge Fricke (Pet. Ex. 17: Affidavit responsive to reporter's transcript of proceedings re filing of reporter's transcript on appeal).

The Fraser transcript was settled on June 1, 2, and 3, 1949, at proceedings conducted by Judge Fricke *in the absence of Petitioner,* with Leavy actively participating as counsel for the People. (Pet. Ex. 1, jacket 3: Rep. Tr. of proceedings re settlement of Rep. Tr. on Appeal.)

At that time Judge Fricke admitted: "this situation in which we find ourselves with reference to preparing a proper transcript on appeal is one of those wholly unanticipated situations which is not specifically covered by the rules of the Judicial Council relating to appeals. (Ibid. pp. 16-17.)

Instead of offering Petitioner counsel and holding a *hearing* on Petitioner's motion, Judge Fricke elected rather to criticize the fact Petitioner was forced to represent himself, stating: "So we find the defendant has also handicapped himself by refusing to have the aid of counsel . . . where as a matter of fact the situation is one in which he should have had counsel." (Ibid.)

Petitioner's sworn claims, appearing in the affidavit in support of the motion for a hearing, that Fraser had misrepresented his ability to read the shorthand notes, that Leavy had been guilty of hoodwinking the

California Supreme Court, etc., were met by being brushed aside with Judge Fricke's statement that: "I realize the defendant, being on the defense side of the case, has an impression that everybody is against him and nobody is willing to do anything for him and that everybody is hostile to him; but I think such a conclusion is the result of a biased mind and is not warranted by anything appearing in the record." (Ibid. p. 18.)

Stanley Fraser was then called and testified self-servingly under questioning by Leavy. (Ibid. pp. 19-26.) His ability to read Perry's notes was not tested.

Leavy stood by while Judge Fricke allowed 80-odd corrections proposed by Petitioner in his written list and denied some 140 others. (In view of Leavy's earlier statements—that he had found only *one* correction and that the Fraser transcript was "as accurate a record as Mr. Perry could have prepared"—the volume of allowed corrections and their character indicated the extreme unreliability of Leavy's memory.

Throughout the three days of the settlement proceedings, in no less than 51 instances Judge Fricke stated that Petitioner (in his written list of suggested inaccuracies submitted from prison) had claimed the Fraser transcript was erroneous but "made no suggestion as to what should go in," did not "state particulars," or that "no aid was given by Petitioner." In each of these instances, the corrections or additions sought were disallowed, because Petitioner had not specified with particularity what they were; and Judge

Fricke had ruled on June 1 (ibid. p. 28) that this duty was incumbent upon Petitioner. (That was why Petitioner had motioned to be present; being locked in a death cell 500 miles away, he obviously could make no showing and offer no proof.)

Several times during these ex parte hearings, Judge Fricke noted that they were proceeding "as nearly as possible" in accordance with the Rules on Appeal, but there was no pretense that literal compliance with the rules was possible or even being attempted.

The Fraser transcript was then "approved" by Judge Fricke and filed with the California Supreme Court (ibid., p. 82). Petitioner immediately challenged its validity and accuracy in the latter court by the institution of mesne proceedings. With supporting papers and exhibits, he filed a "Motion for order of the Supreme Court to order the Superior Court to augment, correct and properly certify record, to order a hearing in the Superior Court relative to this matter, and for the Supreme Court to agree to decide, on appeal (or otherwise) certain undecided questions of law relative to the preparation of a reporter's transcript on appeal in a capital offense and the applicability of section 953e to criminal offenses." Petitioner also motioned and briefed an appeal "from the final order of settlement and so-called certification of the Reporter's Transcript." (Pet. Ex. 1: records of California Supreme Court in 5006, motion, supporting papers, and briefs on the attempted appeal.) Subsequently, Petitioner also sought a writ of habeas corpus as a suggested aid of appellate juris-

diction which was summarily denied June 12, 1950. (Pet. Ex. 1: *In re Chessman*, file of Crim. 5110.)

Then, on August 18, 1949, Leavy presented himself to Judge Fricke, asked the record to show "we are proceeding in open Court on a regular Court day, and may the record show I have subpoenaed as witnesses here today" Ed Bliss and Al Matthews. Leavy asked the record to show further that Petitioner had an appeal pending in the State Supreme Court from the settlement and certification of the Fraser transcript and a motion "to compel this (Superior) court to permit him to be present in Court when there is a further settlement of the record, and to attempt to compel the Supreme Court in some way to claim this record is not usable. . . . In order to meet the appeal and motion", he asked to call the two witnesses. (Pet. Ex. 1, jacket 3: Supplemental Reporters transcript on Appeal, August 18, 1949, pp. 2-3.)

In the face of this candid admission by Leavy that he wished to use the trial court and its processes to foreclose a hearing on Petitioner's claims and to keep Petitioner out of court, Judge Fricke stated:

> "I will allow the taking of testimony with the idea of assisting the Supreme Court in the determination of the motion . . . and to shed further light on matters which are not covered." (Ibid. pp. 3-4.)

The two witnesses, adverse to Petitioner, then proceeded to give their testimony in the absence of Petitioner.

Still over Petitioner's vigorous objection, with portions being ordered added to it but with *hearings* on its validity and adequacy never being held, this Fraser transcript was ultimately accepted by the California Supreme Court.[6] (*People vs. Chessman*, 35 Cal. 2d 455, 218 P. 2d 769, 19 A.L.R. 2d 1084), and subsequently used on the mandatory appeal as a basis for affirming the death and other judgments imposed. (*People vs. Chessman,* 38 Cal. 2d 166, 238 P. 2d 1001.)

---

[6]That Court admitted the challenged transcript was "prepared in a situation for which the Rules on Appeal do not expressly provide (p. 458 of 35 Cal. 2d); that "Concededly the reporter's transcript is not a verbatim record of every word that was said in the trial court" (p. 461 of 35 Cal. 2d); that it was not certified as correct as required but only certified to be correct to the best of the substitute reporter's ability (pp. 458-459 of 35 Cal. 2d). While recognizing that, under State law, Petitioner was entitled to the *entire* record (p. 459 of 35 Cal. 2d), the Court refused to order the record augmented to include in the transcript a "Discussion as to subpoening witnesses" (Pet. Ex. 1; Rep. Tr. p. 10), and a "discussion between the trial court, counsel and the defendant (Chessman), and conceded by the deputy district attorney, that an attorney, William Roy Ives, if given the opportunity to prepare the case, would appear with or for the defendant," (p. 465 of 35 Cal. 2d), both discussions taking place after the case was called.

Finally, while recognizing that a determination of whether one reporter can transcribe another's shorthand notes "is essentially a question of fact to be determined in each case in which it may arise (p. 461 of 35 Cal. 2d), and while placing the burden of proving the prejudicial inadequacy of the transcript upon Petitioner (p. 462 of 35 Cal. 2d), and noticing that Petitioner "urged that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position (p. 467 of 35 Cal. 2d), by denying his motions that he be allowed to appear in the Superior Court, adduce evidence and call hostile and unwilling witnesses, the Court itself foreclosed Petitioner from proving the record inadequate, and this was candidly admitted to be done as a discriminatory penalty for self-representation (p. 467 of 35 Cal. 2d). See the dissenting opinions of Mr. Justice Carter and Mr. Justice Edmonds (pp. 468-473 of 35 Cal. 2d).

When the appeal was heard on the merits, Petitioner again vainly challenged the Fraser transcript's validity and adequacy. (Pet. Ex. 1: file of Crim. 5006, Appellant's Opening Brief, Vol. 1, pp. 131-133—"by accepting this reporter's transcript for use on appeal without affording appellant an opportunity to prove it prejudically incomplete and inaccurate and jurisdictionally defective, and by refusing to order portions of the (trial) proceedings added to it in which inhere Federal Constitutional questions, the Court denies to appellant the due process of law and equal protection of the laws demanded by the Fourteenth Amendment to the Constitution of the United States"—. (Appellant's Closing Brief, pp. 78-82.) With his opening brief, Petitioner filed a motion, summarily denied, for the appointment of a referee, a hearing in Los Angeles and a resolution of the questions of fact Petitioner raised concerning the transcript. (Pet. Ex. 1: file of Crim. 5006, motion and order of denial.) Also with his opening brief, Petitioner filed a petition for habeas corpus, attacking the Fraser transcript and praying for a hearing on the issues of fact alleged. (Pet. Ex. 1: *in Re Chessman*, file of Crim. 5217.) The petition was held for nine months and then summarily denied without hearing, opinion, or requiring Respondent to answer.

The lengthy litigation ensued which has culminated in the present proceeding. (See pp. 209-210 of 235 F. 2d.) The basic questions of the accuracy of the Fraser transcript and the competence, ability and qualifica-

tions of Stanley Fraser, the substitute reporter, remain unlitigated and therefore unresolved.

The petition alleged that Fraser was incompetent, had a long record of arrests for being drunk, and was addicted to the excessive use of alcohol. (R. 11-12, Vol. I.) And when questioned by counsel for Petitioner, Judge Fricke testified at the District Court hearing: "I wouldn't have hesitated for a moment in revoking any proceedings that had been had up to that time if I had found out about it afterwards," referring to Fraser's alleged incompetency as a result of his chronic addiction to alcoholic beverages, and: "If I had even heard the rumor, I would certainly have gone out and made an investigation to ascertain whether there was any foundation for it or justification for it." (H.R. 890, Vol. X.) Yet Judge Goodman refused to permit the FBI and CII files which showed Fraser's long arrest record for being drunk and *one arrest while he was supposedly actually engaged in preparing the record,* to be produced. Neither would Judge Goodman arrange for the production of the arrest reports and logs of the Los Angeles Police Department (which had been secreted and kept from Petitioner's investigator) although Petitioner was prepared to prove by them and the officers signing the reports that Fraser was repeatedly drunk during this period. Nor would Judge Goodman arrange for the production of Mrs. Eva Hoffman, by whom Petitioner offered to prove that at the very time Fraser was engaged in working on the transcript, he was so intoxicated as to be men-

tally and physically incapable of doing such work with any degree of competence. Judge Goodman refused as well to order the production of hospital records which would have revealed Fraser had a long and chronic addiction to alcohol, with inevitable brain damage, and which in addition culminated in 1953 in an attempt at suicide, severe delirium tremens, hallucinations that the Mafia was after him, and lengthy hospitalization. (See Petition for Writ of Certiorari, pp. 43-44.)

The petition further alleged the shorthand notes of the deceased reporter were "undecipherable to a large degree" and that Fraser was "incompetent to transcribe" those notes. (H.R. 9-10, Vol. I.) Yet, almost at the outset of the questioning of Fraser by Mr. Davis, Judge Goodman announced flatly that he was not going to allow the accuracy of the Fraser transcript or the ability of Fraser to transcribe the notes to be tested. (H.R. 248, Vol. V.) He stated further:

> "The Court. Of course I don't know what he (Fraser) put down in the transcription.
>
> Mr. Davis. That's what I'm trying to find out.
>
> The Court. I don't think the Supreme Court of the United States intended me to spend in this court days or weeks of time in determining the accuracy of this transcript. *Whether they did or not, I am not going to do it.*
>
> Mr. Davis. Well, could we have perhaps ten minutes on that?
>
> The Court. That is not an issue in this case. This man (Fraser) could have been the most incompetent reporter in the world and he could have made a mess of the transcript in typing it, and

that does not raise any federal question. The State of California and the parties to the litigation could determine that." (H.R. 249, Vol. V.)

And then:

"The Court. That is right, I am not going to test his (Fraser's) ability in this proceeding or whether or not his statement that he transcribed this—made the transcript is correct or not. . . .

If there is any failure of due process, as the Supreme Court has said, involved in this, that is another question. But the mere accuracy of it—it could be—*it could be 75 per cent wrong, and it wouldn't raise any federal question.*" (H.R. 250, Vol. V.)

Judge Goodman added: ". . . but what the State of California affords by way of methods of providing a transcript is not the subject or concern of this Court." (H.R. 250, Vol. V.)

Mr. Davis then made a detailed offer of proof. Judge Goodman gratuitously called it "an argument about what your views are on the matter," and added, "I may be spending my time here listening to disputes between you and some other reporters about whether a certain symbol was blue instead of green. . . ." (H.R. 252, Vol. V.)

Mr. Paul Burdick, an expert witness produced by the Respondent at the District Court hearing and qualified by Respondent as "certainly entitled to give his opinion of *this* transcription" (H.R. 697, Vol. VIII), admitted on cross-examination he could not read a whole page or even half of a specified page of

the Perry notes! He could make out only an occasional word or two. (H.R. 725, Vol. VIII.) (The Perry notebooks are Pet. Ex. 16-A to K.)

Then came a succession of highly damaging and revealing admissions from Mr. Burdick: he found places where argument was left out; where Perry had "skeletonized" his notes; where for six to eight pages the going was "fast and rough"; where words were left out; where as many as seven or eight lines of Perry's shorthand symbols had not been transcribed on argument on the admissibility of testimony. (H.R. 748-753, Vol. IX.) Perry's notes were "difficult to read"; at places they were "shattered" and "shattered clear out of recognition." (H.R. 775, 777, 785, Vol. IX.) The notes on the disputed instructions to the jury were "pretty well cluttered up with those pencilled notations" of Fraser, and those notes, too, were "shattered." Burdick couldn't read them. (H.R. 789, 792, et. seq., Vol. IX.)

---

**SUMMARY OF ARGUMENT.**
**[Rule 40-1(f).]**

In the circumstances of this case, Petitioner was constitutionally entitled to be personally present and represented by counsel at, and to participate effectively in, the proceedings conducted by the State trial court to create and settle the trial transcript which was used on the automatic appeal to the California Supreme Court as a basis for affirming two sentences of death and fifteen sentences of imprisonment. This

transcript was not prepared in accordance with any known law or rule, but by "human ingenuity", under the unsupervised direction of the prosecutor by his own uncle-in-law, from the deceased reporter's old-style, three position, shaded Pitman shorthand notes, the trial judge's "voluminous" longhand notes, conferences with major prosecution witnesses out of court, and other aids. Petitioner, representing himself, and held at the State prison, was given no voice in the selection of the substitute reporter or the means employed to prepare the transcript.

The trial court's admitted refusal to permit Petitioner to participate in, and to be represented by counsel at, the settlement proceedings denied Petitioner, in the circumstances, due process in its most primary sense. The prosecutor had sworn to the California Supreme Court that Petitioner would have the disputed transcript delivered to him "in court" and that Petitioner would be allowed to present his objections to it at that time. The trial court had informed Petitioner "that there can and will be a *hearing* for the settlement of the transcript." And Petitioner had motioned to be produced that he might test the questioned ability of the substitute reporter to decipher the notes and to offer a showing that the transcript was prejudicially incomplete and inadequate.

But Petitioner was not produced. Neither was he offered counsel. The substitute reporter testified, crucial issues of fact were determined adversely to Petitioner, and the transcript was settled and "approved" at ex parte but nevertheless, adversary hearings, con-

ducted in the absence of Petitioner or anyone acting in his behalf. Petitioner was not then or ever permitted to defend against the use of the transcript.

The cases decided by this Court under the Due Process Clause clearly hold that a party affected by the decision of a trial or hearing shall be given notice and an opportunity to participate in it, and that, if this basic requirement be denied, the decision made in his absence must be set aside. The prejudice demonstrably suffered by Petitioner requires such to be done in this death case, and the jurisdiction of the Court to grant the relief sought is plain.

---

## ARGUMENT.
### [Rule 40-1(g).]

**PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY THE UNIQUE AND AD HOC METHODS EMPLOYED BY THE CALIFORNIA COURTS IN CREATING, SETTLING AND APPROVING—IN THE ABSENCE OF PETITIONER AND COUNSEL TO REPRESENT HIM, AND OVER HIS OBJECTION—THE REPORTER'S TRANSCRIPT ON THE MANDATORY APPEAL IN THIS DEATH PENALTY CASE.**

The State law on the subject of the type of appellate review to be accorded persons sentenced to death in California is clear, unambiguous, and positive. That law was not, and could not be, followed in this case. An *ad hoc* procedure was invented that violated the most fundamental principles of due process and equal protection guaranteed by the Fourteenth Amendment. The Court plainly has jurisdiction to decide the ques-

tion; and that basic concept of fairness which lies at the core of constitutional due process entitles Petitioner to the relief—the adequate opportunity to defend against the allegedly wrongful taking of his life—he vainly has sought for almost nine calendar years.

**A. The Law of California—Substantive and Procedural—Dealing With Review of Death Penalty Convictions by Its Supreme Court.**

California Constitution (Art. VI, sec. 4) provides that

> "The Supreme Court (of California) *shall* have appellate jurisdiction on appeal from the superior courts . . . on questions of law alone, in all criminal cases where judgment of death has been rendered. . . ."

Further, California law *mandatorily* requires an automatic appeal to its Supreme Court in capital cases (Calif. Penal Code, sec. 1239 (b)). This appeal is an "extraordinary precaution" taken by the Legislature "to safeguard the rights of those upon whom the death penalty is imposed by the trial court." (*People vs. Bob,* 29 Cal. 2d 321, 328.) In California, "The right of appeal to the Supreme Court is guaranteed by the Constitution to the prisoner, and is as sacred as the right of trial by jury." (*In re Hoge,* 48 Cal. 3, 6; see *In re Albori,* 95 C.A. 42, 48-49.) And "when by judicial oppression such right (of appeal) is violated or vitiated, the guaranteed substantial rights of a party have been materially affected thereby." (*Wuest vs. Wuest,* 53 C.A. 2d 339, 345.)

The rules of the California Judicial Council[7] declare that in a death penalty case, the *entire* record of the trial must be prepared and certified as true and correct by the proceedings. (Rules on Appeal, Rules 33 (c) and 35 (b).) "The Rules on Appeal have the force of law and cannot be disregarded or ignored by litigant or court." (*Kuhn v. Ferry & Hensler*, 87 C.A. 2d 812, 815.) "(T)he procedural rules of the courts are a part of the due process of law established in this state . . . and must be observed in the interest of orderly functioning of the administration of justice." (*People v. Gilbert*, 25 Cal. 2d 422, 439.) And the State's organic law commands that the California Supreme Court must review the *entire* record in a death penalty case before affirming or reversing. (Const. of Calif., Art. VI, sec. 4½.)

Yet here, with the death of the court reporter, the record was not and could not be prepared in accordance with any existing law or rule governing appeals and particularly this mandatory appeal. All state-established due process had to be thrown out and an *ad hoc* procedure had to be invented if a record was to be prepared at all. One was, by "human ingenuity", over Petitioner's vigorous objections. Petitioner was never allowed to defend against this transcript or to be present and represented by counsel when it was created, settled and "approved." His motions, appeals, and habeas corpus applications for a hearing at which he

---

[7]The power to make implementing rules governing appeals is vested in the State's Judicial Council, not its Supreme Court. (Const. of Calif., Art. VI, sec. 1a; Calif. Penal Code, sec. 1247k.)

might challenge its validity and test the qualifications and ability of the substitute reporter were ignored or denied. Nevertheless, as shown, it was used as a basis for affirming the judgments of conviction imposing two sentences of death and 15 sentences to prison.

**B. The Court's Jurisdiction to Decide the Question.**

Petitioner averred in his petition to the District Court, *inter alia,* that the above procedure deprived him "of his constitutional rights and due process of law and equal protection of the law." (R. 8, 14, Vol. I.) It was specifically alleged that "petitioner was deprived of the right to be present at the hearing of the settlement of the reporter's transcript on said automatic appeal," and "said trial court . . . in connection with the matter of the settlement and approval of the reporter's transcript on appeal, and the hearings had thereon, failed, neglected and refused to afford representation to defendant, either by the personal appearance of your Petitioner, or by the appointment of a competent attorney-at-law to represent your Petitioner at these vital proceedings in connection with the settlement of said reporter's transcript. . . ."

On appeal to the Court below, Judge Lemmon, speaking for himself in his unusual memorandum opinion filed in connection with the denial of rehearing, maintained that this Court's opinion in 350 U.S. 3, which addressed itself to the issue of alleged fraud and corruption in the preparation of the transcript, marked the extreme limits of his Court's jurisdiction, and hence that his Court jurisdictionally could not en-

tertain and decide the question. This, of course, is completely incorrect. Judge Denman's answering memorandum opinion of October 28, 1956 provides a decisive reply to this contention. (R. 295-297; 239 F. 2d at 223.) A fundamental question of constitutional law certainly cannot be said to have been adjudicated adversely to Petitioner merely by the Court's non-mention of the question.

Petitioner desires to add just this: This Court has squarely held that decisions in habeas corpus on prisoners in custody under state process are *not* res judicata. (*Brown vs. Allen,* 344 U.S. 443, 457; see *Price vs. Johnson,* 334 U.S. 266, 291.) Where the ends of justice will be served by a successive inquiry, 28 U.S.C. 2244 specifically authorizes the judge or Court to make such an inquiry, and this Court expressly has so held (*Brown v. Allen, supra,* at 508.)

Thus earlier decisions of the Court of Appeals in 205 F. 2d 128 and 221 F. 2d 276, dealing only with fragmented aspects of the question, when the facts on which it was and is based were not before it, were and are no *jurisdictional* bar to consideration of the question. Neither are the Federal courts bound by decisions or findings of the State courts. This Court has, and the Court of Appeals had, the constitutional power to inquire whether the state law and state process, as construed and applied, has afforded Petitioner due process and equal protection of the law (*Hebert v. Louisiana,* 272 U.S. 312, 316; *Buchalter v. New York,* 319 U.S. 427, 429); and such an inquiry and decision cannot be foreclosed by the prior finding of the State

court; the Federal court will independently examine the facts and reach its own conclusion. (*Norris v. Alabama*, 294 U.S. 587, 590; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659; *Niemotko v. Maryland*, 340 U.S. 268, 271.) As decisively held by this Court in *Reece v. Georgia*, 350 U.S. 85:

> "We have jurisdiction to consider all the substantial federal questions determined in the earlier stages of the litigation (citing cases), and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. (Citing cases.)"

The Court's "power to probe issues disposed of on appeal prior to the one under review is, in the last analysis, a 'necessary correlative' of the rule which limits it to the examination of final judgments." (*Erie v. Thompson*, 337 U.S. 163, 172.)

Significantly, this is the very first opportunity the Court has had to put the question at rest, for the reason that this is the very first time after years of litigation, that Petitioner has succeeded in getting all the State court records and other evidence on which the question is based before the Federal courts.

It should be noted (1) that Judge Goodman in the District Court did not and would not even consider the question, and (2) that actually the three judge panel of the Court of Appeals did not decide the question. Judge Lemmon, although first concurring in the bare majority opinion of Judge Hamley, then, in that later memorandum opinion of his own, emphatically denied the Appellate Court had any jurisdiction to

consider the question (a matter disposed of under B above) and made it clear that his sole concern was with getting the habeas corpus law changed to accord with his personal views of what the law should be, and, in the process, with getting Petitioner promptly put to death.

Judge Hamley's opinion (no longer truly a majority opinion in view of the position subsequently taken by Judge Lemmon) assumes, "without deciding" that the question might be considered. But the opinion then avoids deciding a basic phase of the question with the erroneous statement: "There is here no contention that appellant was denied a right which is customarily accorded to other convicted persons. Had such a showing been made, a serious constitutional question would be presented," citing *Griffin v. Illinois,* 351 U.S. 12, 18.

But Petitioner does contend that he was denied a right which is not only "customarily" but *"mandatorily"* accorded to other convicted condemned persons in California. In all other cases in the state heard under the automatic appeal law and governing rules there has been, *without exception,* a full appellate review upon a complete, jurisdictionally prepared and unchallenged record. In this one case—and this one only—there has been a lesser review, upon an admittedly incomplete, in effect uncertified, and challenged record, prepared by "human ingenuity," with Petitioner being given no opportunity to defend against the use of the record or having any voice in its preparation and settlement. Equal protection? Here there

is neither equality nor protection. Justice (if it can be so called) cannot, under our Federal Constitution, be administered with so unequal a hand. (*Yick Wo v. Hopkins,* 118 U.S. 356; see *Dowd v. Cook,* 340 U.S. 206, 210; *Cochran v. Kansas,* 316 U.S. 255.)

By taking judicial notice of its own records (*Dimmick v. Tompkins,* 194 U.S. 540, 548), the Court will find that not only did Petitioner expressly allege a denial of due process and equal protection in the instant petition, with regard to the procedures employed to prepare the transcript, but that he repeatedly has pressed his claim in the earlier litigation. (See, e.g., No. 239 Misc., Oct. Term, 1953, p. 19 of the petition for certiorari.) ["California has persisted in denying to Petitioner that type of appeal accorded all others similarly situated"], and pp. 53-64 of the same petition, where the contention is there spelled out.

**C. The Guides for Decision and the Reasons Petitioner Is Entitled to Relief.**

The affirmative reasons Petitioner is entitled to relief are succinctly set out in Chief Judge Denman's October 18, 1956, dissenting opinion (R. 281-285, Vol. I; 239 F. 2d at 219), his dissent from denial of rehearing (R. 289, Vol. I; 239 F. 2d at 221); and his subsequently filed memorandum opinion answering Judge Lemmon (R. 295-297, Vol. I; 239 F. 2d at 223).

Judge Hamley's opinion concedes that the record was prepared under what is mildly termed "unusual circumstances" but asserts this "called only for the exercise of a sound discretion in adopting procedures

adequate to meet the special situation." The claim that such a "sound discretion" was employed or that the procedures were "adequate to meet the special situation" is thoroughly refuted by the record.

Moreover, this Court has held that "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (*Roller v. Holly*, 176 U.S. 398, 409.) "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." (*Louis. & Nash. R. R. v. Stock Yards Co.*, 212 U.S. 132, 144.) In determining their adjective as well as substantive law, State courts must accord the litigant due process of law. (*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682.) And the essential elements of due process of law are notice and *adequate opportunity* to defend (*Louisville etc. R. Co. v. Schmidt*, 177 U.S. 230, 236; *Simon v. Craft*, 182 U.S. 427, 436.) But here Petitioner was given *no* opportunity to defend against the use of the disputed transcript, although the California Supreme Court placed the burden of proving that transcript's invalidity and inadequacies squarely upon him. That Court stated (35 Cal. 2d at 462):

> ". . . We perceive no legal impropriety and no unfairness in placing on an appellant in the situation of Chessman the burden of showing either prejudicial error in the record or that the record is so inadequate that he is unable to show such error."

But how, conceivably, could Petitioner have carried the burden of proving the record was so inadequate it

foreclosed him from showing prejudicial error or convictions obtained in violation of fundamental constitutional rights, unless granted a *hearing* and the opportunity to present his proof?

To satisfy due process, this Court repeatedly has held that the citizen *must* have "reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights affected by it." (*Dohany v. Rogers*, 281 U.S. 362, 369 and cases there cited.)

As the Court tersely stated the proposition in *Snyder v. Massachusetts*, 291 U.S. 97, 116:

> "A defendant who has been denied an opportunity to be heard in his defense has lost something indispensible, however convincing the ex parte showing."

Without opportunity to be heard, there is no opportunity to defend. Without opportunity to defend, the power of the State becomes absolute. Here unbridled discretion was substituted for lawful process, with the result that Petitioner was shut out of court while a hybrid record on which his life would be declared forfeit was created, settled, and approved.

Yet, speaking for this Court in the recent case of *Sikes v. Alabama*, 1 L. Ed. 2d 246, 251, Mr. Justice Frankfurter made it clear that

> ". . . the Fourteenth Amendment has placed limitations upon the discretion, unbridled for all practical purposes, that belonged to the states prior to its adoption, and, more particularly, confines their

freedom of action in devising criminal procedures."

"Nothing is better established," as Chief Judge Denman noted in his Court of Appeals dissenting opinion "than that the due process of the Fourteenth Amendment requires that a party affected by the decision of a trial (or hearing) shall be given notice and an opportunity to paticipate in it and that, if this be denied, the decision made in his absence, must be set aside." (239 F. 2d at 219, citing *Standard Oil Co. v. Missouri,* 224 U.S. 281; *Saunders v. Shaw,* 244 U.S. 317, 318; *Powell v. Alabama,* 287 U.S. 45, 67; *Snyder v. Massachusetts,* 291 U.S. 97, 105; *Ohio Bell Tel. Co. v. Public Utilities Comm.,* 301 U.S. 292, 304; *Railroad Comm. v. Pacific Gas,* 302 U.S. 388, 393; See also *Shelly v. Kraemer,* 334 U.S. 1, 16.)

The majority opinion of the Court of Appeals states that, "while the substitute reporter testified at the settlement hearing, he did not appear as a witness for or against the accused." (239 F. 2d at 218.)

This is indulging in too nice and too dangerous a fiction.

The witness was produced by the prosecutor. His payment for preparing the transcript under his contract with the Los Angeles County Board of Supervisors depended upon approval of the transcript by the trial court. Petitioner had directly challenged both the accuracy of the transcript and the ability of the witness to transcribe the deceased reporter's old-style,

three-position, shaded Pitman shorthand notes. Further, Petitioner had expressly motioned to be produced, to consult with the attorney who had sat with him during the trial as "legal advisor," to test the ability of the witness to decipher the notes, and to offer the proof he had in support of his claim that the transcript was prejudicially incomplete and inadequate. As well, the California Supreme Court subsequently recognized that a determination of whether one reporter can transcribe another reporter's shorthand notes "is essentially a question of fact to be determined in each case in which it may arise." (35 Cal. 2d at 461.)

But, nevertheless, the trial court refused to order Petitioner produced although it earlier had informed Petitioner "that there can and will be a *hearing* for the settlement of the transcript," and the prosecutor had sworn to the California Supreme Court that Petitioner would be produced and allowed to present his objections to the transcript "in court."

In law, "the term 'hear' implies that someone is before the Court to speak." "Hearing" is an essential element of due process of law, and *"it contemplates a listening to facts and evidence."* (39 C.J.S. p. 875.) In this due process sense no "hearing" was held, although it was crucial that Petitioner be present and have the Court listen to his facts and evidence. He was the one with a knowledge of the facts, the one who knew what evidence was available to support his position.

At 239 F. 2d 205, 218, the Court of Appeals states that Petitioner could "have been represented by counsel, had he so chosen."

How?

Petitioner had asked to confer with his "legal advisor" at the original trial, had been led to believe he would be produced at the settlement hearing and formally had motioned to be so produced. He never waived his right to counsel at the settlement proceedings. He never was offered counsel. He never knew he would not be produced until he learned the settlement proceedings already had been conducted and concluded.

In holding against Petitioner's right to be present when this hybrid record was settled, the Court of Appeals places great reliance upon the asserted fact that these proceedings were "a part of the appeal procedure, and not a part of the trial at which appellant's conviction was obtained." (239 F. 2d at 218.) This is a *non sequitur*. Whether Petitioner has been denied due process must be tested by *all* proceedings had in the State Courts. (*Frank v. Mangum*, 237 U.S. 309, 327; *Cole v. Arkansas*, 333 U.S. 196, 201.)

To conform to due process of law, Petitioner was entitled to have the validity of his convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial Court. (*Cole v. Arkansas, supra*, at 202.) This must carry with it the corollary right to prove the invalidity and inadequacy of a trial record prepared by "human in-

genuity", and in California the trial Court alone has power to hear and decide questions relating to such a record.

The California Supreme Court's failure to guard and enforce Petitioner's Constitutional rights in the transcript matter—by refusing to order a hearing in the trial Court—is not answered by a substitution of the rationale that where "The record *appears* to contain ample evidence to support the verdict" (35 Cal. 2d at 463), "it is adequate to permit us to ascertain whether there has been a fair trial and whether there has been a miscarriage of justice." (35 Cal. 2d at 462.)

The Court of Appeals is grievously in error in stating that the only wrongs Petitioner claims to have been done to him by the usage of the present transcript are the alleged omission of "an erroneous and prejudicial instruction and an erroneous and prejudicial comment to the jury" by the trial judge. (See 239 F. 2d at 218.) Petitioner repeatedly has attacked the accuracy of the *entire* transcript; time and again, beginning in the trial Court, he specifically has complained that missing from the transcript altogether are sections showing he was denied the right to subpoena certain witnesses, denied representation by counsel of his choice or the alternative right to prepare his own defense, and hence forced to trial unprepared; that the transcription of testimony relating to the purported oral confession is so incomplete and garbled that it kept Petitioner from showing he had been convicted by use in evidence over his objection of a coerced con-

fession; that much of the gross misconduct of the prosecutor has been "smoothed over", or not transcribed; that all of the cross-examination of one capital offense witness is missing and the testimony of other capital offense witnesses is so garbled that Petitioner was prevented from establishing an appeal, particularly in view of the amendment of Section 209 of the California Penal Code, that the acts of the perpetrator did not constitute violations of that section, and hence that Petitioner's death penalty convictions must be reversed, etc. (See, e.g., Pet. Ex. 11: "Defendant-appellant's list of inaccuracies and omissions in the record" attached to the motion made to the trial Court; a similar list filed in the State Supreme Court in Crim. 5006, Pet. Ex. 1; Petition for Certiorari in No. 239 Misc., Oct. Term, 1953, pp. 13-20; Petitioner's testimony in the District Court, H.R. 617-618, 629, 633-636, 649-651.)

But not only did the California Supreme Court refuse to order a hearing in the trial Court on the question of the assailed adequacy of the record, it further refused to order that record augmented to include proceedings had at the trial in which inhered federal constitutional questions on the ground those proceedings could not, in its opinion, lead to a reversal. (35 Cal. 2d at 466.) But that Court could not properly avoid review by this Court of its disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. (*Williams v. North Carolina*, 325 U.S. 226, 236.) It is not simply a question of state procedure when a State Court of last resort

closes the door, as here, to *any* consideration of claimed denial of federal rights. (*Young v. Ragen,* 337 U.S. 235, 238.). State procedure does not bind this Court when so unfair and unreasonable in its application to one asserting a federal right as to obstruct it. (*Central Union Tel. Co. v. City of Edwardsville,* 269 U.S. 190, 195.)

While the right of appeal may not be an essential of due process, "due process [must have] already been accorded in the tribunal of first instance". (*Ohio v. Akron Park District,* 281 U.S. 74, 80.) Yet here, denied a trial Court hearing, Petitioner was barred from proving due process had *not* been accorded him in the tribunal of first instance. Here, moreover, Petitioner was *forced* to appeal on an unauthenticated record, prepared by "human ingenuity" and given no opportunity to defend against its use. However, California's mandatory appeal procedures were designed to protect Petitioner's rights, not destroy them—and him—through an act over which he had no control, the death of the Court reporter.

In practical effect, Judge Hamley's opinion holds that because the state did produce, settle and use a record of sorts on appeal, rather than no record at all, Petitioner can ask and due process and equal protection may demand no more.

This is necessarily to say, under the undisputed facts of this case, that it is all right to produce a record by "human ingenuity," in contravention of all established, controlling and settled state law; to dele-

gate, not to some impartial party, but to the prosecutor, the unsupervised authority to select a substitute reporter to prepare such a record of the trial proceedings; to let the prosecutor select his own uncle-in-law, and keep this fact carefully concealed from the trial judge, the Petitioner and the reviewing Court; to let the prosecutor and the substitute reporter consult on the transcription out of Court; to grant the substitute reporter unlimited time to prepare the record; to let him talk to detectives—key trial witnesses for the prosecution—out of Court, use these talks as a basis for reconstructing their testimony, at the suggestion of the prosecutor, and keep this fact from the trial judge, the Petitioner, and the reviewing Court; to let the substitute reporter prepare the transcript in rough draft form, the rough draft never being seen by the trial Court or Petitioner, although Petitioner formally had asked to be furnished a copy, and then, also out of Court, to permit the prosecutor to "check" the draft before it was copied in final form; to let the prosecutor swear to the reviewing Court that Petitioner (representing himself and held at a state prison) would be produced in Court when the record was settled and never let the trial judge know of this sworn statement;[8] to pay the reporter more than three times the statutory fee for his work; to hold hearings to create and settle the record with neither

[8]The statement bordered on, if it did not actually involve, perjury. See Calif. Pen. Code, section 125: "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Certainly the statement amounted to a fraud upon the California Supreme Court.

Petitioner nor counsel representing him present;[9] to have Petitioner's motions to be present and challenge the transcript and the ability of the substitute reporter to transcribe the dead reporter's notes denied by the reviewing Court without prejudice and ignored by the trial Court; to proceed to have witnesses testify and settle the transcript in the absence of Petitioner; to have the trial judge "approve" such a record without testing the competence of the substitute reporter to decipher the dead reporter's shorthand notes, although the trial judge knew the local Superior Court Reporters' Association officially had gone on record that other Court reporters had examined the notes and found them to be indecipherable in material part; to have the trial judge let the prosecutor use his Court and its processes to keep Petitioner out of Court and foreclose a state Supreme Court-ordered hearing on the validity and adequacy of the record; to have this disputed record accepted by the reviewing Court and used as a basis for affirming death and other judgments, although it was not certified to be complete and correct as required, but only correct to the best of the substitute reporter's ability; and to never allow Petitioner to defend against the use of that transcript or to establish, as he claimed, that missing from it, or garbled in the transcript of it, were sections in which it should have affirmatively appeared

---

[9]Where the accused is defending himself, this Court has held that the trial judge must be particularly alert to see that the accused is not overreached and taken advantage of. (*Gibbs v. Burke*, 337 U.S. 773, 781.) But here, by not producing Petitioner or offering him counsel when the record was settled, the trial judge himself was the person responsible for Petitioner being overreached and taken advantage of.

that Petitioner had been convicted in violation of fundamental constitutional rights."

This, to say the least, is a singular definition of due process and equal protection of the law. As stated by the late Mr. Justice Jackson in a separate opinion in *Brown v. Allen*, 344 U.S. 443, 446: "But I know of no way that we can have equal justice under law except we have some law." The use of "human ingenuity," by the prosecutor, whose avowed purpose was to see Petitioner executed, is certainly no substitute for law.

Yet, in his brief opposing the present petition for certiorari, Respondent argued that "This procedure was reasonable, and in no way discriminatory as to Chessman." How, though, in point of simple fact, could it have been more discriminatory, more inherently unfair?

It does violence to the sense of fair play and justice inherent in the Due Process of Law clause of the Fourteenth Amendment to conceive of and solemnly sanction a hearing—upon which a man's life depends—where evidence is taken and issues of fact determined, with the Defendant neither present in person nor represented by counsel, while at the same time his adversary—the State—is thoroughly and ably represented and while, further, counsel for the State is permitted to use the trial Court and its processes to keep the Defendant out of Court.

## CONCLUSION.

**[Rule 40-1(h).]**

The Court should:

1. Reverse, with appropriate directions (as in *Dowd v. Cook*, 340 U.S. 206), the judgment of the Court of Appeals affirming the order of the District Court discharging the writ of habeas corpus previously granted.

2. Set aside the State trial Court's order creating, settling and approving the trial transcript, as well as the California Supreme Court's affirmance—based on that transcript—of the judgments of conviction imposing the two sentences of death and the fifteen sentences of imprisonment upon Petitioner.

3. Hold that, in the circumstances of this case, Petitioner had a constitutional right under the Fourteenth Amendment to be personally present and represented by counsel at, and to participate effectively in, the proceedings in the State trial Court to create and settle the uniquely prepared reporter's transcript to be used on the automatic appeal (including the right to cross-examine witnesses produced by the State, to test the challenged ability and competence of the substitute reporter, and to produce witnesses and evidence in support of his claims the shorthand notes of the deceased reporter were and are indecipherable in material part and that the Fraser transcript was and is grossly incomplete and inaccurate).

4. Rule, in the alternative, (1) that Petitioner is presently entitled to be discharged from custody, or

(2) that the State trial Court must promptly conduct a new hearing—under the conditions set out in the just above paragraph—to determine the validity and adequacy of the record, and that Petitioner must be discharged from custody if it is established that the deceased reporter's old-style, three-position shaded Pitman shorthand notes are in fact not decipherable in material part and that no true, complete and correct transcript of the trial can be prepared and certified from them.

Dated, April 22, 1957.

Respectfully submitted,

GEORGE T. DAVIS,
*Attorney for Petitioner.*

CARYL CHESSMAN,
*Petitioner pro se.*

ROSALIE S. ASHER,
*Of Counsel.*